

Sep 26, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSE LUIS SANCHEZ, JR,
Petitioner,

v.

DONALD HOLBROOK,
Respondent.

1:17-cv-03196-SAB

**ORDER DENYING PETITION
UNDER 28 U.S.C. § 2254**

Before the Court is Petitioner's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus By a Person in State Custody, ECF No. 1. Petitioner is proceeding pro se. Defendant is represented by Assistant Attorney General John J. Samson.

Petitioner challenges his Yakima County jury conviction for aggravated first degree murder (2 counts), attempted first degree murder (2 counts), first degree robbery, first degree burglary, and first degree unlawful possession of a firearm.¹ He was sentenced in 2008 to life without the possibility of parole.

As grounds for federal habeas relief, Petitioner asserts: (1) denial of his Sixth Amendment right to the assistance of counsel; (2) denial of his right to effective assistance of counsel during an in-chambers discussion; (3) violation of

¹ After the jury trial, a bench trial was conducted on Count 7 – First Degree Unlawful Possession of a Firearm.

1 his right to a public trial during a closed proceeding on appointment of new
2 counsel; (4) denial of due process in the admission of a witness's identification; (5)
3 violation of his Sixth and Fourteenth Amendment rights when his motion to
4 transfer venue from "jail courtroom" to regular courtroom was denied; (6)
5 violation of the Fourteenth Amendment when the trial court denied a motion to
6 suppress; (7) denial of effective assistance of counsel due to counsel's failure to
7 move to suppress evidence; (8) insufficiency of the evidence; (9) denial of his
8 Sixth Amendment right to present a defense and issue a jury instruction; (10) trial
9 court erred in admitting evidence regarding a handgun; (11) trial court erred in
10 admitting evidence of post-arrest conduct; (12) constructive denial of counsel due
11 to a conflict of interest; and (13) ineffective assistance of counsel due to counsel's
12 failure to object to Petitioner's arraignment being filmed by the media when
13 eyewitness identification was an issue in the case.

14 **Facts**

15 The Washington Court of Appeals summarized the facts underlying
16 Petitioner's conviction as follows²:

17 On the night of February 20, 2005, Michelle Kubric left her
18 townhouse apartment to run an errand. Upon backing her Chevrolet
19 Suburban out of its parking spot she was confronted by a Hispanic
20 man with a gun, later established to be Mario Mendez, who appeared
21 in front of the vehicle, illuminated by her headlights. A second
22 Hispanic man, later established to be the appellant, Jose Luis Sanchez
23 Jr., opened the driver's door, grabbed her by the hair, and pulled her
24 from the vehicle. Holding a gun to her head, he walked her back to the
25 apartment where she lived with Ricky Causor, a drug dealer, and their
26 two daughters. He told her to tell Causor to open the door. When
27 Causor opened the door, the man holding her hostage pointed his gun
28 at Causor. She noticed the gun was square-shaped with its
ammunition clip inserted from the bottom. She tried to wrestle the gun
away but Causor said to stop, they were going to "give them what
they want." He let the man enter. Once inside, the gunman forced

² *State v. Sanchez*, 171 Wash. App. 518 (2013).

1 Kublic to kneel on the floor with her and Causor's 3-year-old and 18-
2 month-old daughters.

3 The man she had first seen in her headlights (Mendez) soon
4 entered the apartment, now wearing a mask. He carried a revolver-
5 style handgun and guarded her in the living room while the unmasked
6 intruder took Causor into the kitchen to gather marijuana and money.
7 After Causor retrieved all of his marijuana and approximately \$900 in
8 currency, the unmasked intruder escorted him back to the living room
9 and Causor knelt down facing Kublic. Their daughters were on the
10 floor between them. The unmasked intruder's last act before leaving
11 the apartment was to fire five shots from his .45 caliber handgun at the
12 heads of Causor and Kublic, at close range. Causor was struck by
three shots, two of which passed through his body into the 3-year-old;
both died almost immediately. The unmasked intruder's remaining
shots wounded Kublic, who was hospitalized for a week with gunshot
wounds to her neck, jaw, scapula, lung, and chest. They also injured
the 18-month-old.

13 Officer David Cortez of the Yakima Police Department
14 attempted to interview Kublic in the hospital intensive care unit the
15 following morning. She was medicated, was in obvious pain, appeared
16 tired, and was slow to give answers. She told him the attackers were
17 two Mexican men who she believed arrived in an older full-size light-
18 blue pickup that she noticed when walking out to her car the prior
19 evening. Although Kublic would later describe the two gunmen and
20 their roles differently, Officer Cortez's notes indicate that she told him
21 the first had a wide nose and a lighter complexion and bigger build
22 than the second, and that he wore a mask. She said the second gunman
23 did not wear a mask, had a "sucked in" face, was thinner than the first,
24 was small (she estimated about 5 feet 4 inches or 5 feet 5 inches tall),
and was dingy looking with uncombed matted hair. She said the
second had forced her from her vehicle and made her walk back to her
apartment with a semiautomatic pistol to her head. He was the one
who later shot Causor. She said Causor had taken the first gunman to
another part of the apartment to give him what he wanted while she
and the children stayed with the second.

25 The next morning, February 22, Detective David Kellett, the
26 lead investigator for the department, visited Kublic in the hospital,
27 hoping with her assistance to create composite images of the gunmen.
28 Kublic looked sleepy and under the influence of medication, but was
able to participate for about 45 minutes until pain and discomfort
made her too tired to continue. In providing descriptions to the

1 detective, Kublic initially did not differentiate between the two
2 gunmen except to state that one wore a mask and one did not. She told
3 the detective she did not get as good a look at the one with the mask,
4 but remembered well the face of the person who wore no mask.

5 Detective Kellett then enlisted her assistance in preparing a
6 computer-generated composite of the gunman she remembered best.
7 Kublic described him as thin and gaunt, with long and unkempt
8 straight hair, a thin or short mustache, and a dark Hispanic
9 complexion. Detective Kellett never asked her whether he, or the
10 other, was the shooter. When she reached the point at which she was
11 in too much pain to continue, she told him the depiction was good so
12 far, but that the cheeks needed to be more hollow, the chin different
13 and the hair longer.

14 On the night of February 22, Officer Cortez returned to the
15 hospital and showed Kublic a photomontage. Before allowing Kublic
16 to view this and later photo arrays, he admonished her that she was
17 not required or expected to choose anyone but just to pick the person
18 who did the crime, and that the purpose of the review is not only to
19 arrested offenders but to clear the innocent. The photo array presented
20 by Cortez happened to include Jose Luis Sanchez Jr., but only as a
21 filler photo because he was not yet a suspect. Kublic did not identify
22 him or anyone else from the array.

23 On February 23, police officers received two anonymous
24 telephone tips that Jose Sanchez, or "Junior" Sanchez, a name by
25 which he was commonly known, was responsible for the Causor
26 murder. The second caller said that Junior could be found at 303
27 South Ninth Street. The Ninth Street address was the home of Luz
28 Carrillo, her husband Albert Vasquez, and Luz Carrillo's three
children. The oldest of Carrillo's children, Roberta, then age 15, was
the girlfriend of Junior Sanchez and was pregnant with his child in
February, 2005. The house was described by witnesses as a "drug
house," known to be a place where acquaintances of the
Vasquez/Carrillo family could drop in to smoke marijuana or crystal
methamphetamine. Among those identified by witnesses as regulars at
the Ninth Street house were Junior's older brother Manuel "Puppet"
Sanchez and his younger brother Rene Sanchez. In February 2005,
Junior was living with Roberta at the Ninth Street house.

Acting on the tips, officers set up surveillance and eventually
stopped a Toyota Celica that left the house with Ramon Marmelejo
driving and Junior in the passenger seat. Both were handcuffed and
transported to the police station. While in a holding cell, Junior was

1 captured by a surveillance camera pulling currency from his pocket
2 (as best he could while handcuffed) and attempting to eat it.

3 Back at the Ninth Street house, a frightened Albert Vasquez
4 spontaneously had told an officer that his family needed protection
5 because “the people who killed the little girl” had been at his house.
6 He also told the officer that they left clothing inside. Officers obtained
7 a search warrant for the house and seized the clothing worn by Junior
8 on the day of the crime. They also found and seized a .45 Kimber
handgun hidden within a couch, which proved in later ballistics
testing to be the gun from which all the shell casings and bullets
recovered from the murder scene were fired.

9 Detective Kellett returned to the hospital again late on the night
10 of February 23 to present Kublic with a binder including a 20-page
11 serial array of individual photographs. Among them were photographs
12 of Junior Sanchez, Mario Mendez, and Manuel Sanchez. The
13 detective did not tell her that Junior Sanchez had been arrested. Kublic
14 appeared more alert. Detective Kellett positioned himself beside her
15 and turned the pages, pausing about three seconds with each page.
16 Upon seeing Mendez’s photo, Kublic gasped and said, “that looks like
him.” She did not react in any way upon seeing the photographs of
Junior Sanchez or Manuel Sanchez. After reviewing all of the
photographs, Kublic took the book from the detective’s hands, turned
back to the photo of Mendez and expressed assurance that he was “the
one without the mask.”

17 On February 28, Mendez and Sanchez were charged as
18 codefendants with several crimes including aggravated first degree
murder, which carried a possible death penalty.

19 On March 2, several days after Kublic was released from the
20 hospital, she met with Detective Kellett to provide a tape-recorded
21 statement. By that time, Junior’s booking photo had appeared in the
22 newspaper and on local television news. In the course of Kublic’s
23 recorded statement, she stated that she now thought the suspect she
24 had earlier described as having very short hair might have been the
25 one with the automatic gun. She also stated that he had hair, “but after
26 I saw him on the news, he’s the one with the shaved head, the one that
they have.” Detective Kellett’s understanding was that Kublic had
been sure on February 23 that Mendez was the one without the mask,
but on March 2 was now sure that “the one that they have” (Junior)
was the one without the mask.

27 Mendez became aware within days that he was a suspect. After
28 lying low in Yakima for six weeks, he fled to Mexico in April. He was

1 apprehended attempting to re-enter the United States in October 2005.
2 He would later testify that he had learned Junior was accusing him of
3 being the shooter and was sure the police would find his cell phone,
4 which he had dropped during the crime. Knowing he would be caught
eventually, he decided to return to Washington to face the charges.

5 By the time Mendez was arrested at the border, Jacqueline
6 Walsh and Steven Witchley had been appointed to represent Sanchez.
7 Their appointment was delayed due in part to a conflict of interest that
8 prevented the Yakima County Department of Assigned Counsel
9 (DAC) from representing either Junior or Mendez. When DAC
10 director L. Daniel Fessler learned of Mendez's California arrest on
11 October 25, he began to look for qualified counsel outside his office
12 to represent Mendez. On November 7, a Yakima County judge signed
an order authorizing counsel for Mendez at public expense. On
November 9, Mendez's illegal immigration charges were dismissed
and he was transferred to the Yakima County Jail. Mendez appeared
for arraignment on November 17. Counsel was appointed for him on
November 18.

13 By this time, however, Junior's lawyers had already
14 interviewed Mendez three times. Upon being apprehended at the
15 border, Mendez was initially held in a corrections center in San
16 Diego. Attorney Norma Aguilar was appointed to represent him in
17 connection with the immigration charge. She and representatives of
18 the Mexican Consulate told Mendez not to discuss the Yakima County
criminal charges pending against him with anyone but the lawyers
who would be appointed to represent him in that case.

19 Nonetheless, on November 3, Mendez spoke with Witchley and
20 his investigator Larry Freeman, who had traveled to the detention
21 center in San Diego to interview Mendez about the Yakima crimes.
22 Witchley and Freeman interviewed Mendez about the Yakima charges
23 a second time in San Diego on November 4. During both meetings,
24 Freeman took notes and prepared detailed interview summaries. On
25 November 16, after Mendez's transfer to Yakima, but before he had
been arraigned or appointed counsel, Witchley and Freeman visited
Mendez a third time, this time in the jail, again questioning him about
the pending charges. Freeman again took notes and prepared an
interview summary.

26 The interviews would give rise to a motion to disqualify
27 Witchley and Walsh. An additional basis for the motion was that in
28 December 2005, Roberta Carrillo, her younger sister, AC, then age 15
and her younger brother, RC, then age 12, were flown at Witchley's

1 and Walsh's expense to Stockton, California, to live with their father,
2 Ramiro Carrillo Sr., without the permission of their mother. Carrillo
3 was the children's legal custodian even though they had been living
4 with their mother in Yakima. Witchley and Walsh later asserted that
5 they moved the children solely for humanitarian reasons because they
6 were living in squalor and dangerous conditions in Yakima. They
7 never sought reimbursement of the children's airfare. Before flying
8 the children out of state, Witchley and Walsh did not contact Child
Protective Services or other agencies that could have helped the
children, nor did they inform the police or prosecutor that they were
sending the children away from Yakima.

9 In early January 2006, Detective Kellett and Detective Uriel
10 Mendoza learned that the Carrillo children were in California and flew
11 there to locate them and obtain statements about what they knew
12 about the crimes. Two of the children had personal knowledge of
13 material information inculcating Junior. RC had earlier told police
14 that Junior Sanchez was carrying the .45 caliber murder weapon on
the day of the murders. Roberta had earlier admitted seeing Junior
return to the Ninth Street house with the murder weapon the night of
February 20 and being given the gun for safekeeping by Junior the
following day.

15 In September 2006, Mendez's lawyers filed a motion for
16 sanctions against Witchley and Walsh for alleged violations of the
17 Rules of Professional Conduct, including lawyer-witness conflict,
18 stemming from their contact with Mendez and their arranging for the
Carrillo children to leave the state. They asked that the two lawyers be
disqualified as Junior's counsel, as well as for other sanctions.

19 The State did not join in Mendez's motion for sanctions but
20 advised the court in a response pleading that it had concerns about the
21 allegations of the defense lawyers' conduct. It informed the court that
22 it might investigate criminal charges against Witchley and Walsh for
witness tampering and intimidating a public servant.

23 The court conducted a hearing on the sanctions motion on
24 November 17, 2006. It concluded that Mendez's motion and the
25 State's response raised sufficiently serious prospects of future lawyer-
26 witness and conflict problems that disqualification of Witchley and
Walsh was necessary. A motion for reconsideration of the
disqualification decision was denied.

27 New lawyers were appointed for Sanchez by no later than
28 February 8, 2007. To accommodate the new defense lawyers, trial was
continued from April to November 2007.

1 In August 2007, Sanchez moved to suppress Kublic's
2 eyewitness identification of him as induced by impermissibly
3 suggestive police procedures likely to lead to misidentification. He
4 argued that her identification was too unreliable to be submitted to the
5 jury. Kublic would eventually testify that her initial confusion about
6 whether the shooter had been the man with or without the mask
7 passed as she recovered from the trauma of the shooting, and that she
8 was 100 percent sure that Sanchez was the gunman. She would testify
9 at trial that just before he began shooting, she "saw his face clear as
10 day, mad and pointing the gun." The court denied the suppression
11 motion, concluding that Kublic's in-court identification would
12 appropriately be tested on cross-examination and its reliability was a
13 matter for the jury to decide.

14 In September 2007, Mendez pleaded guilty to murder, burglary,
15 robbery, and assault charges in exchange for truthful trial testimony
16 and a recommended 30-year sentence.

17 In October 2007, Sanchez filed a motion objecting to the
18 court's scheduling of his trial in a courtroom in the Yakima County
19 jail, rather than in the county courthouse. His motion to hold trial in
20 the county courthouse was considered by the trial court at an
21 evidentiary hearing in late October and denied.

22 A four-and-a-half-week trial began on November 5, 2007.
23 Among the witnesses at trial were Mendez and Carlos Orozco Jr.,
24 both regulars at the Ninth Street house. They testified to having been
25 present for discussions of a plan to rob Ricky Causor, who was
26 believed to have a great deal of cash from selling marijuana and to be
27 an easy target because he had not retaliated for a past robbery. The
28 discussions included Junior, Mendez, Orozco, Ramon Marmelejo,
Filiberto "Ben Davis" Montes, and Junior's brothers Manuel and
Rene.

Mendez testified that on the morning of the crime, he traveled
to the Ninth Street house to further discuss the robbery with Orozco
and Junior. Mendez, Junior, and Rene decided to delay the robbery
until later that evening. Early in the evening, Mendez and Junior left
in Junior's blue pickup to buy beer and on the way dropped Mendez's
car off at the apartment of Junior's second girl friend, Sarah Day.
According to Mendez, Junior did not go inside the Day apartment.
Mendez recalled there were three guns in Junior's truck at that time—
Mendez's .38, Junior's .45, and a 9 mm for Rene—as well as ski
masks that Mendez had prepared to serve as disguises. After buying
beer, Junior decided they should drive by Causor's apartment to check

1 it out. He parked in a tight spot on a far end of the apartment's parking
2 lot.

3 While Mendez and Junior sat in the truck drinking a beer,
4 Kublic emerged from her apartment and entered her Suburban.
5 According to Mendez, Junior said, "[T]his is the time" and both men
6 jumped out of the truck and positioned themselves to block the
7 Suburban when Kublic completed backing out of her parking spot.
8 They wore hoods over their heads but no masks; Junior earlier told
9 Mendez he would not wear a mask and never did. Mendez testified
10 that Junior pulled Kublic from the vehicle, pointed a gun at her head,
11 and threatened to kill her if she ran. Junior told Mendez to park the
12 Suburban, which Mendez did, at the end of the parking lot. Mendez
13 then hurried to Junior's truck, put on a mask, and joined Junior inside
14 the apartment.

15 Kublic was by then kneeling on the living room floor, holding
16 her girls. Causor emerged from the kitchen carrying bags of marijuana
17 as Junior held a gun to his head. Causor set four bags of marijuana on
18 a coffee table and pulled money from his pocket and threw it on the
19 floor. Mendez and Junior each picked up a couple of bags of
20 marijuana and stuffed currency in their pockets. Thinking everything
21 was done, Mendez started to leave. But Junior then stepped behind
22 Causor, who by then was kneeling on the floor, hugging Kublic.
23 Junior shot Causor in the back of the head. Junior fired several shots
24 at Kublic as Mendez fled outside.

25 Mendez ran for the Suburban but had misplaced the keys. He
26 noticed a car that had apparently just pulled into the parking lot and
27 had its headlights on, pointed in the direction of the Suburban.
28 Mendez tried to hide behind the Suburban, certain that whoever was
in the car could see him. Meanwhile, Junior had left the apartment and
was making his escape in the truck. Upon hearing the truck and seeing
it approach, Mendez stepped out and Junior stopped, allowing
Mendez to jump in.

Mendez testified that they drove to Junior's uncle's house in
Toppenish. Mendez soon realized that he had dropped his cell phone
and wanted to go back, but Junior refused. At Junior's uncle's house
they divided the marijuana and the cash. Junior traded his share of the
marijuana to his uncle for "ice" (methamphetamine). Junior also tried
to return the .45 to his uncle, to whom it actually belonged, but
according to Mendez, the uncle—who had been told that the robbery
"went wrong" and people had been killed—did not want it. According
to Mendez, the uncle told Junior, "Sell it or get rid of it. Don't get

1 caught with it because you're going to get booked." Upon leaving the
2 uncle's home, Junior dropped Mendez off at his house in Toppenish.

3 Carlos Orozco testified that Junior had pressed the others to
4 commit the robbery and invited him to participate. He ultimately
5 withdrew from the robbery plan for fear that Causor, from whom he
6 regularly bought drugs, would recognize him. He testified that he was
7 at the Ninth Street house on the evening of February 20 and learned
8 about the shooting after the fact that night, from someone who saw it
9 on the news. He and Ramon Marmelejo, who was also present at the
10 Ninth Street house, drove by the Causor apartment to see what was
11 going on and saw police cars and ambulances; Orozco noticed on
12 leaving the Ninth Street house that Junior's blue pickup was gone.
Orozco testified that when Junior returned to the Ninth Street house a
couple of hours later, he was carrying a bag of "ice" in addition to
some snacks. The next day, Orozco accompanied Junior and Roberta
on a meth-selling trip to Wenatchee. According to Orozco, Junior still
had his .45 handgun with him.

13 Roberta Carrillo offered testimony that was largely supportive
14 of Junior. Junior's defense theory proposed that Manuel—who had
15 been driven to Mexico by his sister in 2005 after she learned that
16 Yakima police were looking for him and whose whereabouts were
17 unknown—was the shooter, and Roberta testified that Manuel was an
18 enthusiastic participant in plans for the robbery. She offered less
19 helpful testimony as well, testifying that she and Junior owned two
20 guns that they carried—a "nine" and a ".45"—although she testified
21 that Orozco had access to the .45. She also testified that she and
22 Junior spent the night of February 21 at a motel at his suggestion and
23 that he allowed her at about that time to give his .45 handgun to her
24 parents for protection.

25 The State presented other witnesses who supported the fact that
26 Junior owned and carried the Kimber .45 handgun used in the
27 murders. It called the security guard that Mendez and Junior
28 encountered in the apartment parking lot shortly before the murders,
who testified to speaking briefly with two Hispanic males on the night
of February 20 and described the older, full-size, two-tone blue pickup
truck in which they were parked. The State called the visitor to the
apartment complex whose headlights were shining in the direction of
the Suburban when Mendez fled the apartment; she testified that she
was frightened at seeing an apparent robber, carrying a gun and bag
and wearing what appeared to be a bandana on his face, who she then

1 saw picked up and driven from the parking lot in a large, old, blue
2 pickup.

3 For its part, the defense characterized this as “a classic case[]
4 of misidentification.” It presented evidence that Junior was at the
5 home of his second girl friend, Sarah Day, at the time of the crime. It
6 vigorously challenged the reliability of Kublic’s eyewitness
7 identification by cross-examination and through the testimony of its
8 expert, Dr. Robert Shomer. It pointed to the absence of any forensic
9 evidence tying Junior to the crime scene despite the fact that the State
10 recovered the clothing he was wearing on the night of the robbery; it
11 presented the testimony of a defense expert that given the close range
12 at which the family members were shot, there should have been traces
13 of blood spatter on the shooter’s clothing. It presented evidence
14 raising doubt that Junior’s truck could have been the vehicle that
15 moved in and out of the small, tight parking lot to the apartment given
16 problems with its power steering and the noise created by its glass-
17 packed mufflers—noise that no witness had noted. It presented
18 evidence that Junior allowed others access to the .45 and to his blue
19 pickup. It maintained that someone else—most likely Manuel—was
20 the actual killer. It argued that Junior was falsely accused by Mendez,
21 who stood only to gain from his guilty plea and testimony against
22 Junior.

23 The jury rejected the defense theory and found Junior Sanchez
24 guilty as charged on all counts, all while armed with a firearm. In a
25 bench trial that followed, he was found guilty of first degree unlawful
26 possession of a firearm.

27 *Sanchez*, 171 Wash. App. at 527-539 (citations omitted).
28

29 **Procedural History**

30 Petitioner sought interlocutory discretionary review of the superior court’s
31 order disqualifying his appointed defense counsel; appealed his conviction; and
32 filed a personal restraint petition in the Washington state courts.

33 **(1) Interlocutory Discretionary Review**

34 Petitioner sought interlocutory discretionary review of the superior court’s
35 order disqualifying his appointed defense counsel with the Washington Court of
36 Appeals on January 11, 2007. ECF No. 15, Ex. 3. The Commissioner of the
37
38

1 Washington Court of Appeals denied discretionary review on March 14, 2007.
2 ECF No. 15, Ex. 8. Petitioner sought reconsideration of that ruling and the
3 Washington Court of Appeals denied the Motion to Modify on July 31, 2007. ECF
4 No. 15, Ex. 10. Petitioner sought review by the Washington Supreme Court on
5 August 16, 2007, ECF No. 15, Ex. 11, which denied review on September 28,
6 2007. ECF No. 15, Ex. 12. Petitioner's Motion to Modify was also denied. ECF
7 No. 15, Ex. 14. A certificate of finality was issued on December 31, 2007. ECF
8 No. 15, Ex. 15.

9 **(2) Appeal of Conviction**

10 Petitioner appealed his conviction and sentence to the Washington Court of
11 Appeals on January 23, 2009. ECF No. 15, Ex. 16. He was represented by Susan F.
12 Wilk. He presented the following Assignments of Error:

- 13 1. The trial court erred in disqualifying his counsel under RPC 3.7
14 and RPC 1.8(e).
- 15 2. The order disqualifying counsel violated his Sixth Amendment
16 right to the assistance of counsel and impermissibly intruded into his
17 protected attorney-client relationship.
- 18 3. The disqualification of Petitioner's appointed counsel over his
19 objection and that of his counsel violated his Fourteenth Amendment
20 right to equal protection and article I, section 12, of the Washington
21 Constitution, the privileges and immunities clause.
- 22 4. The trial court denied Petitioner his Sixth Amendment right to
23 be present at a critical stage of the proceedings when it excluded him
24 from an in-chambers discussion regarding the status of his
25 appointment of new counsel.
- 26 5. The trial court violated the right to a public trial provided by the
27 Sixth Amendment and article I, sections 10 and 22 of the Washington
28 constitution when it held a closed proceeding on the appointment of

Petitioner's new counsel.

6. The trial court erred in admitting witness Michelle Kubric's identification of Petitioner in violation of his Due Process rights.

7. The trial court erred in denying his motion to transfer venue from the "jail courtroom" to a regular courtroom in violation of his Due Process rights and presumption of innocence safeguards.

8. The trial court erred in denying Petitioner's Motion to Suppress.

9. The trial court erred in entering conclusions of law No. 4, 5, and 6, pertaining to the CrR 3.6 motion to suppress evidence.

10. Petitioner was denied effective assistance of counsel guaranteed by the Sixth Amendment and article I, section 22 when his defense attorneys failed to move to suppress evidence pursuant to CrR 3.6 prior to trial on counts 1-6.

11. The trial court erred in admitting evidence of a nine millimeter handgun unrelated to the charged crime and evidence of Petitioner's post-arrest conduct in violation of his Due Process rights and contrary to ER 403 and 404(b).

12. The trial court erred in barring Petitioner from inquiring or arguing that Manuel Sanchez was a "jacker" and in instructing the jury to disregard testimony to this effect, and in barring the defense from introducing evidence of the blue truck owned by Ramon Marmalejo in violation of his Sixth Amendment right to present a defense and to effective assistance of counsel.

13. Cumulative error denied Petitioner the right to a fair trial secured by the Fourteenth Amendment and Wash. Const. art. 1, § 3.

Id.

The Court of Appeals affirmed the judgment and conviction on September

1 30, 2012, ECF No. 15, Ex. 2 and denied Petitioner's Motion for Reconsideration
2 on January 28, 2013. ECF No. 15, Ex. 20.

3 Petitioner petitioned the Washington Supreme Court for review. ECF No.
4 15, Ex. 21. He presented the following issues in his Petition for Review:

- 5 1. Whether conducting his trial in the jail violated due process
6 rights and the presumption of innocence.
- 7 2. Whether disqualification of his counsel of choice was improper
8 under ethical lawyer-as-witness and conflict-of-interest provisions and
9 violated his Sixth Amendment right to counsel of choice and his
10 Fourteenth Amendment right to equal protection.
- 11 3. Whether Petitioner's rights to be present and to a public trial
12 were violated when the court excluded him from a hearing regarding
13 the appointment of new counsel
- 14 4. Whether his due process rights were violated by the admission
15 of Michelle Kubric's identification of him, or whether an independent
16 state constitutional analysis under article I, § 3 compels exclusion.
- 17 5. Whether his trial counsel was ineffective for failing to bring a
18 meritorious motion to suppress the fruits of his arrest prior to trial.
- 19 6. Whether the Court of Appeals erred when it held that evidence
20 acquired as a direct result of his arrested was too attenuated from the
21 arrest to be excluded.
- 22 7. Whether ER 403 and 404(b), and Petitioner's due process rights
23 were violation by the introduction of certain evidence.
- 24 8. Whether the trial court erred in excluding evidence necessary
25 for Petitioner to argue his theory of the case.
- 26 9. Whether cumulative error denied Petitioner his right to a fair
27 trial.

28 ECF No. 15, Ex. 21.

1 The Washington Supreme Court denied his petition for review on August 5,
2 2013. ECF No.15, Ex. 22. The mandate was issued on August 14, 2013. ECF No.
3 15, Ex. 23.

4 (3) Personal Restraint Petition

5 Petitioner filed his Personal Restraint Petition (PRP) on August 8, 2014.
6 ECF No. 15, Ex. 24. He was represented by Susan F. Wilk. In his PRP, he
7 presented the following arguments:

8 1. Petitioner was denied his Sixth Amendment right to counsel at a
9 critical stage when he was arraigned without counsel, resulting in
10 irreversible forfeiture of substantial rights and prejudice to his right to
11 a fair trial.

12 2. Alternatively, counsel was ineffective when he failed to object to
13 Petitioner being filmed by the media at his arraignment, which
14 prejudiced him.

15 *Id.*

16 The Washington Court of Appeals denied his petition on January 26,
17 2017. ECF No. 15, Ex. 29. The Washington Supreme Court denied review
18 on August 21, 2017, ECF No. 15, Ex. 32 and the mandate issued on October
19 18, 2017. ECF No. 15, Ex. 33.

20 I. Jurisdiction

21 Relief by way of a petition for writ of habeas corpus extends to a person in
22 custody pursuant to the judgment of a state court if the custody is in violation of
23 the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a);
24 *Williams v. Taylor*, 529 U.S. 362, 375 n.7 (2000). Petitioner was convicted by jury
25 verdict in Yakima County Superior Court of two counts of aggravated first degree
26 murder, two counts of attempted first degree murder, first degree robbery, and first
27 degree burglary. In a bench trial that followed, he was found guilty of first degree
28

1 unlawful possession of a firearm. The court sentenced him to life without the
2 possibility of parole.

3 Petitioner filed a federal habeas corpus petition pursuant to 28 U.S.C. § 2254
4 and is currently in Washington State custody confined at the Monroe Correctional
5 Complex –Twin Rivers Unit, in Monroe, Washington. Petitioner asserts that he
6 suffered violations of his rights as guaranteed by the U.S. Constitution and the
7 challenged convictions arise out of the Yakima County Superior Court, which is
8 located within the jurisdiction of this Court. Accordingly, the Court has jurisdiction
9 over the action.

10 **II. Legal Standard**

11 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death
12 Penalty Act of 1996 (“AEDPA”), which applies to all petitions for writ of habeas
13 corpus filed after its enactment. *Chein v. Shumsky*, 373 F.3d 978, 983 (9th Cir.
14 2004). Since Petitioner filed the petition for habeas corpus after April 24, 1996, the
15 provisions of the AEDPA govern.

16 Under the AEDPA, an application for habeas corpus will not be granted
17 unless the state court’s adjudication of the claim “resulted in a decision that was
18 contrary to, or involved an unreasonable application of, clearly established Federal
19 law, as determined by the Supreme Court of the United States” or “resulted in a
20 decision that was based on an unreasonable determination of the facts in light of
21 the evidence presented in the State Court proceeding.” 28 U.S.C. § 2254(d);
22 *Lockyer v. Andrade*, 538 U.S. 63, 70 (2003). Only “clearly established Federal law,
23 as determined by the Supreme Court of the United States” can be the basis for
24 relief under the AEDPA. *Campbell v. Rice*, 408 F.3d 1166, 1170 (9th Cir. 2005).
25 “Clearly established Federal law” is the governing legal principle or principles set
26 forth by the Supreme Court at the time the state court renders its decision. *Lockyer*,
27 538 U.S. at 71.

28 A state court decision is “contrary to” clearly established Supreme Court

1 precedent “if the state court applies a rule that contradicts the governing law set
2 forth” in Supreme Court cases or “if the state court confronts a set of facts that are
3 materially indistinguishable from” a Supreme Court decision but “nevertheless
4 arrives at a result different from” that precedent. *Id.* at 73. A state court decision is
5 an “unreasonable application of clearly established federal law” if “the state court
6 identifies the correct governing legal principle” from a Supreme Court decision
7 “but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at
8 75. A federal court may also grant a writ of habeas corpus if a material factual
9 finding of the state court reflects “an unreasonable determination of the facts in
10 light of the evidence presented in the State court proceeding.” 28 U.S.C. §
11 2254(d)(2). State court findings of fact are presumptively correct in federal habeas
12 proceedings, and the petitioner bears the burden of rebutting the presumption of
13 correctness by clear and convincing evidence. 28 U.S.C. §2254(e)(1). In
14 considering potential state court error, this court looks to the “last reasoned
15 decision of the state court as the basis of the state court’s judgment.” *Franklin v.*
16 *Johnson*, 290 F.3d 1223, 1233 n.3 (9th Cir. 2002).

17 In short, “[t]he question under AEDPA is not whether a federal court
18 believes the state court’s determination was incorrect but whether that
19 determination was unreasonable.” *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).
20 “AEDPA also requires federal habeas courts to presume the correctness of state
21 courts’ factual findings unless applicants rebut this presumption with ‘clear and
22 convincing evidence.’” *Id.* at 473-74.

23 Petitioner has the burden of establishing that the decision of the state court is
24 contrary to or involved an unreasonable application of United States Supreme
25 Court precedent. *Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996). A pro se
26 prisoner’s request for relief will be construed liberally as a habeas petition despite
27 formal imperfections. *United States v. Seesing*, 234 F.3d 456, 463-64 (9th Cir.
28 2000) (holding that pro se filings are to be liberally construed).

1 **III. Motion for Pro Bono Counsel**

2 Petitioner moves the Court to appoint pro bono counsel. ECF No. 13. State
3 prisoners do not have a constitutional right to counsel when mounting collateral
4 attacks upon the judgement of a state court pursuant to § 2254. *Pennsylvania v.*
5 *Finley*, 481 U.S. 551, 555 (1987). By statute, district courts have discretion to
6 appoint an attorney in habeas corpus proceedings when “the interests of justice so
7 require and [the prisoner] is financially unable to obtain representation.” 18 U.S.C.
8 § 3006A(a)(2)(B). Counsel should be appointed when the “difficulties involved in
9 presenting a particular matter are such that a fair and meaningful hearing cannot be
10 had without the aid of counsel.” *Dillon v. United States*, 307 F.2d 445, 447 (9th
11 Cir. 1962). Appointment is mandatory only when the circumstances of a particular
12 case indicate that appointed counsel is necessary to prevent due process violations.
13 *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986).

14 Here, appointment of counsel is not warranted. In the instant case, the issues
15 are straightforward. Petitioner is in possession of all the relevant facts and he has
16 demonstrated he has a good understanding of the issues presented, and the ability
17 to coherently present his contentions.

18 **IV. Evidentiary hearing**

19 An evidentiary hearing is not required on issues that can be resolved by
20 reference to the state court record.” *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir.
21 1998) (affirming the denial of an evidentiary hearing where the applicant’s factual
22 allegations “fl[ew] in the face of logic in light of ... [the applicant’s] deliberate acts
23 which are easily discernible from the record”).

24 Here, there are no factual allegations that need to be resolved through an
25 evidentiary hearing. As such, an evidentiary hearing is not necessary.

26 **V. Exhaustion of State Remedies**

27 Respondent does not challenge that Petitioner properly exhausted claims 1-7
28 and 9-13, but asserts that he failed to properly exhaust Claim 8.

1 In Claim 8, Petitioner argues his conviction should be reversed because the
2 state presented insufficient evidence to prove that he possessed the nine millimeter
3 handgun that was the subject of Count 7 of the criminal complaint. Petitioner did
4 not present this argument in his direct appeal or in his PRP.

5 “Before seeking a federal writ of habeas corpus, a state prisoner must
6 exhaust available state remedies, 28 U.S.C. § 2254(b)(1), thereby giving the State
7 the opportunity to pass upon and correct alleged violations of its prisoners’ federal
8 rights.” *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (quotations omitted). “To
9 provide the State with the necessary ‘opportunity,’ the prisoner must ‘fairly
10 present’ his claim in each appropriate state court (including a state supreme court
11 with powers of discretionary review), thereby alerting that court to the federal
12 nature of the claim.” *Id.*

13 Despite that Petitioner did not fairly present this particular claim to the
14 Washington state courts, he had exhausted his state court remedies at the time he
15 filed for habeas relief in the federal district court. This is because Petitioner is
16 procedurally barred from pursuing remedies in state court. *See Casey v. Moore*,
17 386 F.3d 896, 919 (9th Cir. 2004) (explaining that exhaustion can occur by fair
18 presentation to the appropriate state courts or when some independent and
19 adequate state ground bars relief). Wash. Rev. Code § 10.73.090, which sets forth a
20 one year statute of limitations for collateral attacks, provides an independent and
21 adequate state ground to bar federal review of Claim 8. *See Shumway v. Payne*,
22 223 F.3d 982, 989 (9th Cir. 2000) (holding that the petitioner had “failed to
23 demonstrate that Wash. Rev. Code. § 10.73.090 is not an adequate and independent
24 state procedural rule that bars her claims from federal habeas review.”).

25 Here, Petitioner is procedurally barred from presenting Claim 8 because the
26 statute of limitations has passed. Consequently, the procedural bar that exhausted
27 Petitioner’s claim (by making it impossible for him to fairly present his federal
28 claims to state court) also renders the federal claims unavailable for review

1 because it has been defaulted on account of an adequate and independent state law
2 ground.³

3 **VI. Review of Petitioner's Claims**

4 In his Petition, Petitioner presents thirteen separate claims for habeas relief,
5 although most fall under the rubric of the Sixth Amendment:

6 **(1) Sixth Amendment**

7 **A. Denial of Sixth Amendment Right to Assistance of Counsel**

8 The Sixth Amendment provides, that [i]n all criminal prosecutions, the
9 accused shall enjoy the right . . . to have the Assistance of Counsel for his
10 defence.” *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984) (quoting U.S.
11 Const. amend. VI). This includes the right to effective assistance of counsel and
12 the right to select counsel of one’s choice, although an indigent defendant does not
13 have the right to counsel of choice. *United States v. Gonzalez-Lopez*, 548 U.S. 140,
14 146-48 (2006).

15 **Claim 1**

16 In Claim 1, Petitioner argues the trial court denied him his Sixth Amendment
17 right to the assistance of counsel and impermissibly intruded into his protected
18 _____

19 ³ If a state procedural bar is an adequate and independent ground warranting
20 dismissal, relief by writ of habeas corpus is foreclosed in federal court unless the
21 petitioner can show cause for the procedural default and resulting prejudice, or
22 show that a failure to consider his claims would result in a fundamental
23 miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Noltie v.*
24 *Peterson*, 9 F.3d 802, 804–05 (9th Cir. 1993). As for cause, “the existence of cause
25 for a procedural default must ordinarily turn on whether the prisoner can show that
26 some objective factor external to the defense impeded counsel’s efforts to comply
27 with the State’s procedural rule.” *Coleman*, 501 U.S. at 753 (internal quotation
28 marks omitted). Petitioner has not shown cause or prejudice.

1 attorney client relationship when it disqualified his counsel of choice. He argues
2 the trial court incorrectly found that his original trial counsel had become a witness
3 in the case even though a third person had been present during the communications
4 with witnesses. He alleges the trial court erred in basing its removal of the original
5 trial counsel on counsel's removal of witnesses from the jurisdiction without
6 sufficient evidence to support its decision.

7 Here, the Washington Court of Appeals correctly found that Petitioner did
8 not have a Sixth Amendment right to his choice of counsel because he had not
9 retained his counsel. *See Gonzalez-Lopez*, 548 U.S. at 151 (noting the right to
10 counsel of choice does not extend to defendants who require counsel to be
11 appointed for them). Petitioner is not entitled to relief because the Washington
12 Court of Appeals' decision was not contrary to, or an unreasonable application of,
13 clearly established federal law. Claim 1 is denied.

14 **Claim 2**

15 Petitioner argues the trial court violated his Sixth Amendment right to
16 counsel at a critical stage when it excluded him from an in-chambers discussion
17 that took place several weeks after his initial appointed counsel were disqualified.
18 The discussion was between the trial judge and L. Daniel Fessler, who was the
19 director of the Yakima County Department of Assigned Counsel (DAC), in which
20 they discussed the appointment of new counsel for Petitioner. Petitioner was not
21 present for the discussion.

22 The Sixth Amendment safeguards to an accused who faces incarceration the
23 right to counsel at all critical stages of the criminal process. *Iowa v. Tovar*, 541
24 U.S. 77, 80 (2004). Once the adversary judicial process has been initiated, the
25 Sixth Amendment guarantees a defendant the right to have counsel present at all
26 "critical" stages of the criminal proceedings. *Montejo v. Louisiana*, 556 U.S. 778,
27 786 (2009). An accused's right to have assistance of counsel for his or her defense
28 encompasses counsel's assistance whenever necessary to assure a meaningful

1 defense. *United States v. Wade*, 388 U.S. 218, 225 (1967). In addition to counsel's
2 presence at trial, "the accused is guaranteed that he need not stand alone against the
3 State at any stage of the prosecution, formal or informal, in court or out, where
4 counsel's absence might derogate from the accused's right to a fair trial." *Id.*

5 "A critical stage is a 'trial-like confrontation, in which potential substantial
6 prejudice to the defendant's rights inheres and in which counsel may help avoid
7 that prejudice.'" *United States v. Leonti*, 326 F.3d 1111, 1117 (9th Cir. 2003)
8 (quotation omitted). Critical stages include, for example, post-indictment police
9 lineups, arraignments, and sentencing. *Id.* (citations omitted). The essence of a
10 "critical stage" is not its formal resemblance to a trial, but the adversary nature of
11 the proceeding, combined with the possibility that a defendant will be prejudiced in
12 some significant way by the absence of counsel. *Id.*

13 The Washington Court of Appeals found that Petitioner's exclusion from the
14 trial court's discussion with Mr. Fessler about appointing new counsel did not
15 violate his constitutional confrontation, due process and public trial rights because
16 the meeting between Mr. Fessler and the trial court was to address only the
17 administrative need to find counsel for Petitioner. ECF No. 15, Ex. 2, at 38. It
18 reasoned that because the lawyer selection and appointment process does not
19 involve the introduction of the factual and legal issues of the case, and because an
20 indigent defendant has no right to input in the process, the meeting between the
21 trial court and Mr Fessler did not constitute a critical stage that required
22 Petitioner's presence. *Id.*

23 The Washington Court of Appeals' conclusion that the meeting was not a
24 critical stage of the proceedings that required Petitioner's presence was reasonable.
25 Petitioner's presence at the meeting to discuss the appointment of counsel was not
26 necessary to provide Petitioner with a fair trial and was not an integral part of the
27 adversary process. The nature of the meeting was not adversarial. Moreover,
28 Petitioner has not shown that he was prejudiced in any way by his failure to attend

1 the meeting.

2 Petitioner has not rebutted the presumption of correctness that is afforded the
3 Washington Court of Appeals’ findings and conclusion; therefore habeas relief on
4 this claim is not appropriate. The Washington Court of Appeals’ denial of his Sixth
5 Amendment claim was not contrary to, or an unreasonable application of,
6 established federal law. Claim 2 is denied.

7 **Claim 7**

8 Petitioner argues he was denied effective assistance of counsel when his trial
9 defense attorneys failed to move to suppress evidence prior to the jury trial on
10 Counts 1-6.

11 To establish ineffective assistance of counsel, a defendant must prove: (1)
12 “counsel’s representation fell below an objective standard of reasonableness,” and
13 (2) there is a reasonable probability that, but for counsel’s unprofessional errors,
14 the result of the proceeding would have been different.” *Strickland*, 466 U.S. at
15 694. “The likelihood of a different result must be substantial, not just conceivable.”
16 *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

17 A court considering a claim of ineffective assistance must apply a “strong
18 presumption” that counsel’s representation was within the “wide range” of
19 reasonable professional assistance. *Strickland*, 466 U.S. at 689. It is Petitioner’s
20 burden is to show “that counsel made errors so serious that counsel was not
21 functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”
22 *Id.* at 687.

23 “The standards created by *Strickland* and [AEDPA] are both highly
24 deferential, and when the two apply in tandem, review is doubly so.” *Harrington*,
25 562 U.S. at 105 (internal quotation marks and citations omitted). In considering the
26 state court’s denial of Petitioner’s IAC claims, then, “[t]he pivotal question is
27 whether the state court’s application of the *Strickland* standard was unreasonable.”
28 *Id.* at 101. The Court does not determine whether counsel’s performance fell below

1 *Strickland*'s standard because "'an unreasonable application of federal law is
2 different from an incorrect application of federal law.'" *Id.* (quoting *Williams v*
3 *Taylor*, 529 U.S. 362, 410 (2000)). Thus, the Court must "guard against the danger
4 of equating unreasonableness under *Strickland* with unreasonableness under
5 [AEDPA]. . . . The question is whether there is any reasonable argument that
6 counsel satisfied *Strickland*'s deferential standard." *Id.* at 105. This means a "state
7 court's determination that a claim lacks merit precludes federal habeas relief so
8 long as 'fairminded jurists could disagree' on the correctness of the state court's
9 decision." *Id.* at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

10 After the jury trial, but before the bench trial on the charge of first degree
11 unlawful possession of a firearm, Petitioner's counsel moved to suppress evidence
12 of the 9mm handgun that was found in Ramon Marmelejo's car. Although the trial
13 court denied the motion, the Washington Court of Appeals concluded that the trial
14 court erred in denying the motion to suppress for purposes of Count 7.⁴ Petitioner
15 argues that his counsel provided ineffective assistance by not moving to suppress
16 evidence obtained through the unlawful arrest before the jury trial on counts 1-6.
17 He argued before the Washington Court of Appeals that the unlawful arrest
18 provided a basis for excluding both the 9mm handgun and the evidence of his
19 attempt to eat money while in the holding cell.

20 The Washington Court of Appeal concluded that it was unable to evaluate
21 whether a motion to suppress would have been granted given that the Court had
22 previously concluded the State failed to present any evidence regarding the
23 reliability of the anonymous informant or the timing of arrest and the obtaining of
24 incriminating information from Albert Vasquez and Luz Carillo. ECF No. 15, Ex.

25
26 ⁴ The Washington Court of Appeal ultimately concluded the error was harmless
27 beyond a reasonable doubt because the trial court also found Petitioner unlawfully
28 possessed the .45 handgun used in the killing. ECF No. 15, Ex. 2, at 43.

1 2, at 43. Now that the tables had turned, Petitioner could not meet his burden to
2 show that a motion to suppress likely would have been granted. *Id.*

3 Ultimately, the Washington Court of Appeals concluded that Petitioner
4 could not show that he was prejudiced by the failure to move to suppress the
5 evidence prior to the jury trial. *Id.* at 44. It noted that “a good deal of evidence of
6 the 9mm handgun was presented at trial that Sanchez made no effort to exclude
7 and to which he did not object. Since the jury was well aware that Sanchez was
8 associated with a 9mm handgun, its learning that he possessed one when arrested
9 would not likely have changed the trial outcome.” *Id.* The Washington Court of
10 Appeals also rejected Petitioner’s argument that he was prejudiced when evidence
11 that he ate money was admitted at trial. *Id.* The Washington Court of Appeals
12 relied on *Wong Sun*⁵ to conclude that evidence of Petitioner eating money was too
13 attenuated from the arrest so any taint from the illegal arrest was dissipated. *Id.*

14
15 _____
16 ⁵In *Wong Sun*, the United States Supreme Court set forth the principles to be
17 applied in determining whether statements and other evidence obtained after an
18 illegal arrest or search should be excluded. *Wong Sun v. United States*, 371 U.S.
19 471 (1963). There, the Court held that the connection between the defendant’s
20 unlawful arrest and his statement had “become so attenuated as to dissipate the
21 taint,” given the defendant was arraigned and released on his own recognizance
22 and he returned voluntarily several days later to make his statement. *Id.* at 491. It
23 noted:

24 We need not hold that all evidence is “fruit of the poisonous tree”
25 simply because it would not have come to light but for the illegal
26 actions of the police. Rather, the more apt question in such a case is
27 “whether, granting establishment of the primary illegality, the
28 evidence to which instant objection is made has been come at by
exploitation of that illegality or instead by means sufficiently
distinguishable to be purged of the primary taint.”

Id. at 487-88.

1 The Washington Court of Appeals' conclusion that Petitioner failed to show
2 he was prejudiced by his counsel's failure to move to suppress evidence prior to
3 his jury trial was not contrary to, or an unreasonable application of, established
4 federal law. Petitioner cannot show the failure to file the motion to suppress prior
5 to the jury trial in any way prejudiced him. Given the other evidence of gun
6 ownership introduced at trial, Petitioner cannot establish that the outcome of his
7 trial would have been different. Moreover, the Washington Court of Appeals'
8 application of *Wong Sun* was not unreasonable. Claim 7 is denied.

9 **B. Defects in the Arraignment Process**

10 In Claim 12, Petitioner argues he was represented at a critical stage by a
11 lawyer who had a conflict of interest that resulted in a constructive denial of
12 counsel. In Claim 13, Petitioner argues his right to effective assistance of counsel
13 was violated when his counsel failed to appear at his arraignment to object to him
14 being filmed.

15 The Washington Court of Appeals summarized the facts regarding
16 Petitioner's arraignment as follows⁶:

17 Police arrested Sanchez on February 23, 2005, after acting on
18 anonymous telephone tips that he was responsible for the Causor
19 murders. The next day, he appeared for a single court hearing on two
20 matters: (1) arraignment on an outstanding 2004 matter charging him
21 with certain felonies, and (2) a preliminary appearance in the current
22 murder case. The prosecutor was present but no attorney appeared for
23 Sanchez. First addressing the 2004 matter, the court advised Sanchez
24 of his rights, which he acknowledged he understood before requesting
25 that the court appoint counsel. The prosecutor interjected that an
26 attorney had already been appointed on the 2004 matter, but that
27 Yakima County public defender/director of assigned counsel, Daniel
Fessler, was requesting that the court appoint him on both matters.
The court did so. The court then explained to Sanchez that he was
being held under investigation on suspicion for first degree murder,
attempted first degree murder, first degree robbery, and felon in
possession of a firearm. Based on a police probable cause declaration

28 ⁶ *In re Sanchez*, 197 Wash.App. 686 (2017).

1 showing that acquaintances of Sanchez had implicated him in the
2 robbery and murders, the court found probable cause to believe
3 Sanchez committed one or more crimes. The probable cause
4 declaration also stated that “victim Michelle Kublic was shown a
5 photo montage, which included ‘Gato’s’ photo, whose name is Mario
6 Mendez. She positively identified him as one of the males who
7 entered her house and shot them.” The court set Sanchez’s bail at \$5
8 million and scheduled his arraignment for February 28.

9 On February 28, 2005, the State formally charged Sanchez and
10 Mendez (who still remained at large) with seven crimes including two
11 counts of aggravated first degree murder, which carried a possible
12 death penalty. That day, Sanchez and an unknown number of other
13 defendants appeared in superior court for a group arraignment
14 hearing. The court explained their rights and noted that each “has a
15 lawyer appointed to represent you or you might have hired a private
16 attorney.”

17 The court then explained the process for the arraignment
18 hearing:

19 [W]hen your name is called we’ll ask you to step up to the
20 counter in front of this microphone. The prosecutor will hand you a
21 piece of paper called an information. That lists the charges. She will
22 read that to you if you want her to read it out loud. You don’t have to
23 have it read out loud.

24 After that, I’m going to ask you a couple of questions. I’m
25 going to ask you if you understand the charges and if you have any
26 questions about the rights I have just explained.

27 If you don’t have questions, I am going to hand you an order.
28 On the order there is the next two dates that you need to be in court.
One is for an omnibus hearing. The next is for your trial.

....

Many of you have not had a chance to talk to your lawyer yet, if
it’s appointed counsel. You’re [sic] lawyer is going to get a packet of
information from the prosecutor’s office in the next couple of days.
They will schedule a time to come and meet with you.

At the end of all this I’m going to hand you that order and ask
you to sign the order at the bottom of the page. By signing the order
you’re not admitting that you have done anything wrong. It lets us
know that you have gotten a copy of the paperwork today.

The court then called Sanchez’s case. The court’s prior
explanation of rights to the defendants included the right to counsel,
but did not specify any right to have counsel present during the

1 current hearing. No attorney appeared for Sanchez. The prosecutor
2 recited the seven charges and gave Sanchez a copy of the information.
3 Sanchez acknowledged to the court that he understood the charges,
4 and he declined a full reading of the information. He said he had no
5 questions about the rights previously explained to him. The court
6 entered an order setting dates for the omnibus hearing and trial.
7 Sanchez signed the order and received a copy.

8 No one broached the subject of entering a plea during the
9 arraignment. The court apparently entered summary not guilty pleas
10 for Sanchez. No concerns regarding the arraignment procedure were
11 ever voiced during the remainder of the pretrial and trial proceedings.

12 *In re Sanchez*, 197 Wash.App. at 689-91.

13 **Claim 12**

14 Petitioner argues that at his arraignment, he was represented by L. Daniel
15 Fessler, who had an unwaivable conflict because either he or his office had
16 previously represented the victims, as well as an uncharged co-conspirator.
17 According to Petitioner, he was represented at a critical stage by a lawyer who had
18 a conflict of interest, which resulted in a constructive denial of counsel. He
19 maintains this was a structural error.

20 A criminal defendant has a Sixth Amendment right to counsel that attaches
21 at all critical stages in the proceedings. *Wade*, 388 U.S. at 224. This right extends
22 to “any stage of the prosecution, formal or informal, in court or out, where
23 counsel’s absence might derogate from the accused’s right to a fair trial.” *Id.* at
24 226. The Court must “analyze whether potential substantial prejudice to
25 defendant’s rights inheres in the particular confrontation and the ability of counsel
26 to help avoid that prejudice.” *Id.*

27 The U.S. Supreme Court instructs that “the right to counsel attaches at the
28 initial appearance before a judicial officer.” *Rothgery v. Gillespie Cnty, Tex.*, 554
U.S. 191, 198 (2008). It went on to explain:

[a]ttachment occurs when the government has used the judicial
machinery to signal a commitment to prosecute as spelled out in
Brewer [*Brewer v. Williams*, 430 U.S. 387 (1977)] and *Jackson*

1 [Michigan v. Jackson, 475 U.S. 625 (1986)]. Once attachment occurs,
2 the accused at least is entitled to the presence of appointed counsel
3 during any “critical stage” of the postattachment proceedings; what
4 makes a stage critical is what shows the need for counsel’s presence.
5 Thus, counsel must be appointed within a reasonable time after
6 attachment to allow for adequate representation at any critical stage
7 before trial, as well as at trial itself.

8 *Id.* at 211-12.

9 A criminal defendant’s Sixth Amendment right to counsel includes the right
10 to be represented by an attorney with undivided loyalty. *Wood v. Georgia*, 450
11 U.S. 261, 271 (1981). This guarantee is so important that, unlike with other Sixth
12 Amendment claims, when a defendant alleges an unconstitutional actual conflict of
13 interest, “prejudice must be presumed,” *Delgado v. Lewis*, 223 F.3d 976, 981 (9th
14 Cir. 2000) (citation omitted), and harmless error analysis does not apply. *United*
15 *States v. Allen*, 831 F.2d 1487, 1494–95 (9th Cir.1987) (citation omitted).

16 Initially, the Court interpreted Petitioner’s claim as arguing that he was
17 actually represented at the February 24, 2005 initial appearance by Mr. Fessler and
18 this violated his Sixth Amendment right to counsel as Mr. Fessler had an
19 unwaivable conflict. A review of the transcript of the initial appearance clarified
20 that this was not so. Mr. Fessler was not present at the initial appearance. At the
21 February 24, 2005 hearing, Petitioner was arraigned on charges of second degree
22 taking a motor vehicle without permission, second degree malicious mischief, and
23 bail jumping. ECF No. 15, Ex. 24, at 896-97. At the arraignment, he was advised
24 of his rights to counsel, right to a speedy and public trial, right to remain silent,
25 right to not testify, right to question witnesses, and was informed of the
26 presumption of innocence, and right to appeal a guilty verdict. Petitioner stated he
27 understood those rights, and also requested a court-appointed attorney. *Id.* The
28 judge appointed counsel and the prosecutor attending the hearing indicated that
although other counsel was previously appointed on the outstanding 2004 matter,
Mr. Fessler had requested that he be appointed because he would be dealing with

1 the other case. *Id.* at 899. It does not appear Petitioner is challenging the process
2 provided in arraigning him on the charges of second degree taking a motor vehicle
3 without permission, second degree malicious mischief, and bail jumping.

4 With respect to the second matter, the judge informed Petitioner that he was
5 being held on suspicion of two counts of murder in the first degree, attempted
6 murder in the first degree, robbery in the first degree and felon in possession of a
7 firearm. *Id.* at 900. The judge made a finding of probable cause and appointed Mr.
8 Fessler to represent Petitioner in the matter. *Id.*

9 Petitioner did not argue on his direct appeal or in his Personal Restraint
10 Petition that his Sixth Amendment rights were violated at the February 24, 2005
11 hearing due to the conflict of Mr. Fessler. Consequently, to the extent this is the
12 nature of Claim 12, the Court will not address this argument.

13 To the extent, Petitioner is arguing that his Sixth Amendment rights were
14 violated when Mr. Fessler or any other counsel failed to show up and represent him
15 at the February 28, 2005 arraignment, this argument was presented in Petitioner's
16 Personal Restraint Petition. There, he argued that even though he had been
17 appointed counsel, his lawyer's failure to show up resulted in a complete
18 deprivation of counsel.

19 The Washington Court of Appeals concluded that the pretrial hearing was
20 not a critical stage of the prosecution, *In re Sanchez*, 197 Wash. App. at 702 and
21 the Washington Supreme Court affirmed that conclusion. ECF No. 15, Ex. 32, at 3.
22 It noted that Petitioner failed to show that "any right or defense he possessed
23 prearraignment was forfeited or went unpreserved by his attorney's absence at
24 arraignment." *Id.* The Washington courts concluded that because the hearings were
25 better characterized as informal hearings where Petitioner stood no risk of waiving
26 any rights or foregoing any defenses, made no admissions of guilt, did not forfeit
27 any rights to plead guilty, or risked forfeiting any right to plead not guilty by
28 reason of insanity, the proceedings "lacked the substance so as to confer on it

1 “critical stage” status. *Id.*; *In re Sanchez*, 197 Wash.App. at 702. Thus, any
2 infringement on his right to counsel did not give rise to a presumed prejudice or
3 structural error. *Id.*

4 The Washington courts’ denial of Petitioner’s claim of Denial of Effective
5 Assistance of Counsel was not contrary to, or an unreasonable application of,
6 established federal law. Petitioner has not rebutted the presumption afforded the
7 state court’s findings or shown that under the Washington criminal system, the
8 initial proceeding or arraignment are a critical stage of the proceedings requiring
9 the presence of counsel. Counsel’s failure represent Petitioner at the arraignment
10 was not a violation of the Sixth Amendment. Claim 12 is denied.

11 **Claim 13**

12 Petitioner maintains that at his arraignment his counsel should have objected
13 to the presence of the media in the courtroom. Because his counsel was not there
14 and could not object, he received ineffective assistance of counsel.

15 In reviewing Petitioner’s claim under the *Strickland* framework, both courts
16 concluded that Petitioner failed to show he was prejudiced by any news coverage.
17 Both courts noted that Petitioner failed to present any evidence that the victim
18 identified him from news media photographs obtained at the arraignment. ECF No.
19 15, Ex. 32, at 1168-69; *In re Sanchez*, 197 Wash.App. at 704-05. On the contrary,
20 the record shows only that the victim told police that she first recognized him from
21 the news after she was out of the hospital. *Id.* The news media had extensively
22 covered the case by that point and it is not clear from the record what photograph
23 or footage the victim saw that led to her recognizing Petitioner. *Id.* It was mere
24 speculation to conclude that the photograph or footage that she saw was footage or
25 photographs from the arraignment. *Id.* Finally, the courts also noted that Kublic’s
26 identification of Petitioner was not the only evidence the State produced linking
27 him to the crimes. *Id.*

28 The Washington courts’ denial of Petitioner’s Ineffective Assistance of

1 Counsel claim was not contrary to, or an unreasonable application of, established
2 federal law. Petitioner cannot not show that he was prejudiced by the presence of
3 the media at his arraignment and thus, cannot establish a Sixth Amendment
4 violation of his right to counsel. Claim 13 is denied.

5 **C. Sixth Amendment Right to a Public Trial**

6 **Claim 3**

7 Petitioner argues the trial court violated his Sixth Amendment right to public
8 trial when it held a closed proceeding on the appointment of new counsel and
9 excluded him from participating.

10 “The requirement of a public trial is for the benefit of the accused; that the
11 public may see he is fairly dealt with and not unjustly condemned, and that the
12 presence of interested spectators may keep his triers keenly alive to a sense of
13 their responsibility and to the importance of their functions.” *Waller v. Georgia*,
14 467 U.S. 39, 46 (1984)(citations and quotations omitted). “In addition to ensuring
15 that judge and prosecutor carry out their duties responsibly, a public trial
16 encourages witnesses to come forward and discourages perjury.” *Id.* That said,
17 limited closure of proceedings can serve a substantial institutional interest without
18 violating the Sixth Amendment. *Id.* at 47.

19 The first question that must be answered is whether *Waller* applies in this
20 instance. The United States Supreme Court has not held that in-chambers
21 conferences violate the right to public trial. Generally, legal arguments over
22 relatively routine administrative matters do not implicate the concerns expressed
23 in *Waller*, such as discouraging perjury and assuring that the judge and prosecutor
24 carry out its duties responsibly.

25 The Washington Court of Appeals held that because the meeting was not an
26 evidentiary phase of the trial, or an adversary proceeding, or involved a matter
27 that required resolution of disputed facts, Petitioner did not have a right to a public
28 hearing. ECF No. 15, Ex 2, at 39.

1 Given the lack of holdings from the United States Supreme Court regarding
2 the whether the Sixth Amendment right to a public trial attaches to a purely
3 administrative proceeding of the kind involved here, it cannot be said that the state
4 court “unreasonabl[y] appli[ed] clearly established Federal law.” *See Carey v.*
5 *Musladin*, 549 U.S. 70, 76 (2000). Consequently, the state court’s decision was
6 not contrary to or an unreasonable application of clearly established federal law
7 and habeas relief is not warranted on Claim 3.

8 (2) Due Process Violations

9 A. Witness Identification (Claim 4)

10 Petitioner argues the trial court violated his right to due process when it
11 admitted at trial the victim’s identification of himself.

12 Generally, the reliability of relevant testimony typically falls within the
13 province of the jury to determine. *Perry v. New Hampshire*, 565 U.S. 228, 232
14 (2012). That said, the United States Supreme Court has recognized due process
15 safeguards where the police have arranged suggestive circumstances leading the
16 witness to identify a particular person as the perpetrator of a crime. *Id.*

17 Even if an identification is infected by improper police influence, however
18 this evidence is not automatically excluded. *Id.* Rather, the trial judge must screen
19 the evidence pretrial for reliability. *Id.* If there is “a very substantial likelihood of
20 irreparable misidentification,” the evidence should not be admitted at trial. *Id.*
21 (quotation omitted). “But if the indicia of reliability are strong enough to outweigh
22 the corrupting effect of the police-arranged suggestive circumstances, the
23 identification evidence ordinarily will be admitted, and the jury will ultimately
24 determine its worth.” *Id.*

25 “When no improper law enforcement activity is involved, . . . it suffices to
26 test reliability through the rights and opportunities generally designed for that
27 purpose, notably, the presence of counsel at postindictment lineups, vigorous
28 cross-examination, protective rules of evidence, and jury instructions on both the

1 fallibility of eyewitness identification and the requirement that guilt be proved
2 beyond a reasonable doubt.” *Id.* “The fallibility of eyewitness evidence does not,
3 without the taint of improper state conduct, warrant a due process rule requiring a
4 trial court to screen such evidence for reliability before allowing the jury to assess
5 its creditworthiness.” Courts must assess, on a case-by-case basis, whether
6 improper police conduct created a “substantial likelihood of misidentification. *Id.*

7 Petitioner’s counsel moved to suppress any in-court identification by the
8 victim, Michelle Kublic, because her ability to identify him had been irreparably
9 tainted. After holding a three-day hearing, the trial court denied the motion finding
10 no evidence that the police officers investigating the murder did anything that
11 could be construed as unduly suggestive nor did they violate any recognized
12 obligation to guard against a witness viewing news coverage.

13 At trial, Petitioner cross-examined Kublic about her identification. He also
14 called Dr. Robert Shomer, a forensic psychologist who testified to problems with
15 eyewitness identification in general and to Kublic’s identification of Petitioner in
16 particular.

17 The Washington Court of Appeals concluded the trial court did not err in
18 denying Petitioner’s motion to suppress Kublic’s identification of Petitioner.
19 *Sanchez*, 171 Wash. App. at 383. It concluded that presenting a picture to a witness
20 twice did not qualify as improper police conduct. *Id.* Moreover, the trial court
21 provided Petitioner with broad latitude to challenge Kublic while the weight and
22 credibility of her testimony was for the jury to decide. *Id.*

23 The Washington Court of Appeals correctly applied the reasoning of *Perry*
24 to conclude that Petitioner failed to establish that improper police techniques.
25 Petitioner has not shown that the police used improper police techniques. Where
26 the police have not used improper techniques, it is for the jury to decide the
27 reliability of the eyewitness testimony. The Washington Court of Appeals’
28 conclusion that the trial court did not err in admitting the victim’s identification of

1 Petitioner was not contrary to, or an unreasonable application of federal law.
2 Consequently, habeas relief on Claim 4 is available.

3 **B Denial of Motion to Transfer Venue (Claim 5)**

4 Petitioner argues the trial court violated his Due Process rights, as well as his
5 Equal Protection rights and privileges and immunities clause when it denied his
6 motion to transfer venue from the “jail courtroom” to a regular courtroom.

7 The right to a fair trial is a fundamental liberty secured by the Fourteenth
8 Amendment. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). Central to that right “is
9 the principle that ‘one accused of a crime is entitled to have his guilt or innocence
10 determined solely on the basis of the evidence introduced at trial, and not on
11 grounds of official suspicion, indictment, continued custody, or other
12 circumstances not adduced as proof at trial.’” *Holbrook v. Flynn*, 475 U.S. 560,
13 567 (1986) (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)). “The
14 presumption of innocence, although not articulated in the Constitution, is a basic
15 component of a fair trial under our system of criminal justice.” *Estelle*, 425 U.S. at
16 503. “To implement the presumption, courts must be alert to factors that may
17 undermine the fairness of the fact-finding process. In the administration of criminal
18 justice, courts must carefully guard against dilution of the principle that guilt is to
19 be established by probative evidence and beyond a reasonable doubt.” *In re*
20 *Winship*, 397 U.S. 358, 364 (1970).

21 While the actual impact of a particular practice on the judgment of jurors
22 cannot always be fully determined, the U.S. Supreme Court has instructed courts to
23 exercise close judicial scrutiny when faced with “the probability of deleterious
24 effects on fundamental rights.” *Id.* “Courts must do the best they can to evaluate
25 the likely effects of a particular procedure, based on reason, principle, and common
26 human experience.” *Id.* On the other hand, the U.S. Supreme Court has instructed
27 that “[i]t is essential to the proper administration of criminal justice that dignity,
28 order, and decorum be the hallmarks of all court proceedings in our country.”

1 *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

2 Security measures at trial are inherently prejudicial when they “tend to brand
3 the defendant in the jurors’ eyes with an unmistakable mark of guilt,” or when they
4 create “an unacceptable risk of impermissible factors coming into play.” *Williams*
5 *v. Woodford*, 384 F.3d 567, 588 (9th Cir. 2004) (quotations omitted).

6 In *Holbrook*, the petitioner challenged the presence of four uniformed state
7 troopers sitting in the first row of the spectator’s section during the petitioner’s and
8 his five other co-defendant’s trial. *Id.* at The uniformed troopers were hired to
9 provide additional security at the trial, due to constraints on the courtroom’s
10 security personnel. *Id.* at 563. In reversing the grant of the habeas petition, the U.S.
11 Supreme Court stated:

12 All a federal court may do in such a situation is look at the scene
13 presented to jurors and determine whether what they saw was so
14 inherently prejudicial as to pose an unacceptable threat to defendant’s
15 right to a fair trial; if the challenged practice is not found inherently
16 prejudicial and if the defendant fails to show actual prejudice, the
inquiry is over.

16 *Id.* at 572.

17 The Washington Court of Appeals concluded the trial court’s decision to
18 hold the trial in the jailhouse courtroom was not an abuse of discretion. *Sanchez*,
19 171 Wash. App. at 571. It also questioned whether *Holbrook* stands for the
20 proposition that jailhouse courtroom are inherently prejudicial. *Id.* at 569.

21 Given the lack of holdings from the United States Supreme Court regarding
22 the whether jailhouse courtrooms are inherently prejudicial, it cannot be said that
23 the state court “unreasonabl[y] appli[ed] clearly established Federal law.” *See*
24 *Carey*, 549 U.S. at 76. Consequently, the state court’s decision was not contrary to
25 or an unreasonable application of clearly established federal law and habeas relief
26 is not warranted on Claim 5. Moreover, Petitioner has not shown actual prejudice
27 by the use of the jailhouse courtroom.
28

1 **(3) Denial of Motion to Suppress (Claim 6)**

2 Petitioner argues the trial court erred when it denied his motion to suppress
3 evidence.

4 Petitioner moved to exclude evidence of a 9mm handgun that was
5 discovered under the passenger seat of the car where Petitioner was sitting at the
6 time of his arrest. The trial court denied the motion. The Washington Court of
7 Appeals concluded that the presence of the 9mm corroborated testimony from the
8 co-defendant and other witnesses of events leading up to the robbery and murder,
9 including testimony that Petitioner regularly carried on of the two firearms he
10 owned (the 9mm and the .45) and testimony about who hoped to use the 9mm in
11 the planned robbery. ECF No. 15, Ex. 2, at 43. It noted that evidence of
12 Petitioner's ownership of the guns was presented through the testimony of three
13 witnesses. *Id.* As such, even if the trial court abused its discretion in admitting
14 evidence of the 9mm, such admission was harmless. *Id.*

15 The United States Supreme Court has instructed that where the State has
16 provided an opportunity for full and fair litigation of a Fourth Amendment claim,
17 the Constitution does not require that a state prisoner be granted federal habeas
18 corpus relief on the ground that evidence obtained in an unconstitutional search or
19 seizure was introduced at his trial.” *Stone v. Powell*, 428 U.S. 465, 481 (1976).
20 “The relevant inquiry is whether petitioner had the opportunity to litigate his claim,
21 not whether he did in fact do so or even whether the claim was correctly decided.”
22 *Newman v. Wengler*, 790 F.3d 876, 880 (9th Cir. 2015) (quoting *Ortiz-Sandoval v.*
23 *Gomez*, 81 F.3d 891, 899 (9th Cir.1996)).

24 Here, it is clear from the record that Petitioner had an opportunity for a fair
25 hearing regarding the admission of the gun. This forecloses any further inquiry on
26 this claim. As such, Claim 6 is denied.

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1 **(4) Right to Present a Defense (Claim 9)**

2 Petitioner argues the trial court denied him the right to present a defense
3 when it barred him from presenting certain evidence. Specifically, he asserts he
4 should have been allowed to present evidence that Mr. Manuel Sanchez was a
5 “jacker” and to present evidence that another suspect Ramon Marmalejo owned a
6 blue truck. He also asserts the trial court erred in refusing to issue a missing
7 witness instruction regarding Mr. Marmalejo.

8 While the Constitution guarantees criminal defendants “a meaningful
9 opportunity to present a complete defense,” state and federal lawmakers have
10 broad latitude under the Constitution to establish rules excluding evidence from
11 criminal trials. *Nevada v. Jackson*, 569 U.S. 505, 509 (2013) (citations omitted).
12 On the other hand, arbitrary rules that are disproportionate to the purpose they are
13 designed to serve and result in the denial of a complete defense are
14 unconstitutional. *Holmes v. South Carolina*, 547 U.S. 319, 325 (2006). Only rarely
15 is the right to present a complete defense violated by the exclusion of defense
16 evidence under a state rule of evidence. *Jackson*, 569 U.S. at 509.

17 Also, with respect to other suspect evidence, the United States Supreme
18 Court has recognized that rules regulating the admission of evidence proffered by
19 criminal defendants to show that someone else committed the crime with which
20 they are charged are widely accepted. *Holmes*, 547 U.S. at 327. It noted that
21 generally, evidence tending to show another person committed the crime charged
22 may be introduced by an accused when it is inconsistent with, and raises a
23 reasonable doubt of, his own guilt; but frequently matters offered in evidence for
24 this purpose are excluded because they are so remote and lack any connection with
25 the crime. *Id.* (quoting 41 C.J.S., Homicide § 216, pp. 56–58 (1991)). It also noted
26 that such evidence may be excluded where it does not sufficiently connect the
27 other person to the crime, such as where the evidence is speculative or remote, or
28 does not tend to prove or disprove a material fact in issue at the defendant’s trial.

1 *Id.* (quoting 40A Am.Jur.2d, Homicide § 286, pp. 136–138 (1999)).

2 **A. Evidence that Manuel Sanchez as a “Jacker”**

3 “Jacking” is a term for robbery. The term “jacking” was introduced at the
4 trial when Petitioner’s lawyer asked Carolos Orozco about Manuel Sanchez.⁷
5 Counsel asked Orozco if Manuel’s main thing was jacking people. Orozco
6 answered yes. He was asked if Manuel robbed people in order to get money for his
7 meth, and Orozco answered yes.

8 The prosecutor then wanted to ask Orozco whether Petitioner was a
9 “jacker,” contending the defense open the door to otherwise inadmissible
10 information that Manuel and Petitioner had committed robberies together. The trial
11 court did not permit this line of questioning, concluding the door had not been
12 opened. The prosecution then asked for an order in limine precluding defense
13 counsel from further referring to Manuel as a “jacker.” The trial court instructed
14 the jury to disregard any reference to Manuel Sanchez as being a jacker and to not
15 consider that testimony for purposes of their ultimate deliberations.

16 The trial court permitted the jury instruction because it concluded that
17 Petitioner could not have it both ways. Petitioner could not prevent evidence of his
18 own propensity for jacking, but then offer the same evidence of jacking of his
19 brother, hoping to persuade the jury that it was his brother who committed the
20 murder and robbery for which he was on trial. The trial court ruled the evidence
21 inadmissible under Evidence Rule 404(b).

22 The Washington Court of Appeals agreed that evidence that Manuel is a
23 jacker is 404(b) propensity evidence:

24 Evidence that jacking people was Manuel’s “main thing” and the way
25 he paid for his meth is also propensity evidence that is inadmissible

26 ⁷ Manuel Sanchez is Petitioner’s brother. Petitioner maintained that his brother
27 Manuel participated in the robbery, not him. To avoid confusion, the Court refers
28 to Manuel Sanchez by his first name.

1 under the rule when offered for the purpose offered by Sanchez.
2 Evidence of a person's occupation is normally not restricted by ER
3 404(b), but the restrictions may come into play if the person's
4 occupation is, itself, criminal in nature.

5 ECF No. 15, Ex. 2, at 45.

6 The Court of Appeals ultimately concluded that suppression of the jacker
7 evidence did not deprive Petitioner of the opportunity to present his "other
8 suspect" theory, especially in light of the fact that Petitioner was permitted to
9 present evidence that Manuel planned to participate in the robbery of Causor. *Id.* at
10 46.

11 This conclusion was not contrary to, or an unreasonable application of,
12 federal law. The state evidence rule at issue, ER 404(b), prohibits the introduction
13 of propensity evidence. It is undisputed that this rule serves several legitimate
14 interests in the criminal trial process, and thus, it is neither arbitrary nor
15 disproportionate in promoting these ends. The application of ER 404(b) did not
16 prevent Petitioner from presenting a complete defense.

17 **B. Evidence of Marmalejo's ownership of blue truck**

18 Petitioner argued that his right to present a complete defense was denied by
19 the trial court's refusal to permit Emanuel Reyes' testimony that Ramon
20 Marmelejo owned a blue truck. He argues this evidence supported his theory that
21 this truck was used as the getaway vehicle. Apparently, when the officers
22 responded to the 911 call at the apartment complex where the murders and robbery
23 took place, they observed a blue pickup leaving with two Hispanic males inside.
24 They did not investigate further because it was an apartment parking lot and the
25 blue pickup reportedly involved in the crime had already left the scene.

26 Reyes, who was Marmelejo's cousin, was going to testify that Marmelejo
27 lived at a certain address two or three years earlier, and a blue pickup presently at
28 that address had been there and was operable two to three years earlier. Petitioner
believed this information, along with the fact that the police saw another blue truck

1 at the crime scene and other testimony that placed Orozco and Marmelejo at the
2 Ninth Street house on February 20, was needed to present a complete defense.

3 The trial court held that Petitioner relied on speculation to show that
4 Marmelejo had access to the blue pickup, had ever driven it, or that he had driven
5 it on February 20, 2018. The Washington Court of Appeals concluded the trial
6 court did not abuse its discretion in prohibiting Reyes from testifying, given that
7 Petitioner had not established or offered “a train of relevant circumstances pointing
8 to Marmelejo as a suspect who drove a blue pickup on February 20, 2005.” ECF
9 No. 15, Ex. 2, at 47.

10 The Washington Court of Appeals’ determination that it was not improper to
11 prohibit Reyes from testifying was not contrary to, or an unreasonable application
12 of federal law. *See Holmes*, 547 U.S. at 326 (noting that “[w]ell-established rules
13 of evidence permit trial judges to exclude evidence if its probative value is
14 outweighed by certain other factors such as unfair prejudice, confusion of the
15 issues, or potential to mislead the jury. . . the Constitution permits judges ‘to
16 exclude evidence that is repetitive . . . , only marginally relevant or poses an undue
17 risk of harassment, prejudice, [or] confusion of the issues.’”) (citations omitted).

18 C. Missing Witness Instruction

19 Petitioner argues the trial court should have issued a missing witness
20 instruction regarding Ramon Marmelejo.

21 A missing-witness instruction informs the jury that it can presume an
22 unproduced witness would have testified unfavorably to the party failing to
23 produce the witness. *United States v. Leal-Del Carmen*, 697 F.3d 964 (9th Cir.
24 2012). There are two requirements for a missing-witness instruction: (1) the party
25 seeking the instruction must show that the witness is peculiarly within the power of
26 the other party; and (2) under the circumstances, “an inference of unfavorable
27 testimony from an absent witness is a natural and reasonable one.” *Id.*

28 It is not clear whether Petitioner presented this claim before the Washington

1 courts. Regardless, for the reasons stated above, Petitioner has not shown there is a
2 reasonable inference that Mr. Marmalejo's testimony would have been unfavorable
3 and therefore, a missing witness instruction was not required.

4 In sum, the Washington Court of Appeals' determination that Petitioner was
5 not denied an opportunity to present a complete defense is not contrary to, or an
6 unreasonable application of, established federal law. As such, Claim 9 is denied.

7 **(5) Evidentiary Errors (Claims 10 and 11)**

8 "[T]he Due Process Clause does not permit the federal courts to engage in a
9 finely tuned review of the wisdom of state evidentiary rules." *Marshall v.*
10 *Lonberger*, 459 U.S. 422, 438, n.6 (1983). Thus, the failure to comply with the
11 state's rules of evidence is neither a necessary nor a sufficient basis for granting
12 habeas relief. *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). A
13 federal habeas corpus petitioner is entitled to relief from a state evidentiary error
14 only if the alleged error was so grossly prejudicial that it fatally infected the trial
15 and denied the petitioner fundamental fairness. *Id.*

16 In **Claim 10**, Petitioner argues the trial court erred in admitting evidence of
17 the nine millimeter handgun and in **Claim 11**, he argues the trial court erred in
18 admitting evidence of his post-arrest conduct.

19 As set forth above, Petitioner moved to exclude evidence of a 9mm handgun
20 that was discovered under the passenger seat of the car where Petitioner was sitting
21 at the time of his arrest. While the trial court denied the motion, the Washington
22 Court of Appeals concluded that even if the trial court abused his discretion in
23 admitting evidence of the 9mm, such admission was harmless because evidence of
24 Petitioner's ownership of the guns was presented through the testimony of three
25 witnesses. ECF No. 15, Ex. 2 at 43.

26 After Petitioner was arrested, he was captured by a surveillance camera
27 attempting to pull money from his pockets and eat it while being held in a jail
28 holding cell. The money was tested, but no match to the victim's blood or DNA

1 was detected.

2 The Washington Court of Appeals held this evidence was admissible as the
3 jury could reasonably infer the unusual act of eating money was for the purpose of
4 destroying evidence that might be linked to the murder scene and therefore infer
5 that it was evidence of consciousness of guilt. ECF No. 15, Ex. 2, at 44.

6 Even if the trial court erred in admitting this evidence, it is not basis for
7 habeas relief. Petitioner has not shown that the alleged errors were so grossly
8 prejudicial that they fatally infected the trial and denied him fundamental fairness.
9 Claim 10 and 11 are denied.

10 **(6) Conclusion**

11 Petitioner has failed to show that he is in custody in violation of the
12 Constitution of the United States. As such, his habeas petition is denied.

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Accordingly, **IT IS HEREBY ORDERED:**

1. Petitioner's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus By a Person in State Custody, ECF No. 1, is **DENIED**.

2. The District Court Executive is directed to enter judgment in favor of Respondent and against Petitioner.

3. For the reasons set forth above, this Court certifies that any appeal from this Order would not be taken in good faith. See 28 U.S.C. § 1915(a)(3); Fed. R. App. P. 24(a)(3)(A).

IT IS SO ORDERED. The Clerk of Court is directed to enter this Order and provide a copy to Petitioner and counsel.

DATED this 26th day of September 2018.



Stanley A. Bastian

Stanley A. Bastian
United States District Judge